IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15344 of 2003

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHETNABEN W/O MUKUNCHANDRA BALKRISHNA BHATT

Versus

NATWARLAL FOOLSHANKER JOSHI

Appearance:

1. Special Civil Application No. 15344 of 2003

MR DN PANDYA for Petitioner

MR JIVANLAL G. SHAH with

MR HARSHAD J SHAH for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 22/04/2004

ORAL JUDGEMENT

Heard the learned advocates.

Leave to delete the respondent no. 2.

The present petition arises from the Order dated 29th September, 2003 made by the learned Joint District Judge, Fast Track Court, Bharuch in a matter arising under the Guardians & Wards Act, 1890.

The subject matter of dispute is custody of the minor child, Hemani [now around six years of age]. The minor Hemani was born to the petitioner herein out of the wedlock with her husband Kirankumar, the son of the respondent herein. Unfortunately, in the year 2002, the said Kirankumar died of liver ailment. Thereafter, the petitioner has, with the intervention of the respondent. remarried to her present husband one Mukundchandra Balkrishna Bhatt. The said Mukundchandra Bhatt has a 10 year old son from his previous marriage. Since her remarriage, the petitioner and her minor daughter Hemani were residing with the said Mukundchandra Bhatt. However, the petitioner and the minor Hemani had visited the respondent on the occasion of the marriage of his younger son one Rohitkumar. After the marriage of the said Rohitkumar, minor Hemani stayed over with her grandparents for a few days. The said grandparents, however, refused to hand over custody of the minor Hemani to the present petitioner. The petitioner had to move the learned Judicial Magistrate for search of the minor Hemani. The respondent, therefore, moved Guardian & Ward Application No. 12 of 2003 for custody of minor Hemani under the Guardians & Wards Act, 1890. Pending the said application, the respondent moved application Exh.5 for retaining custody of minor Hemani during the pendency of the said application viz. Guardian & Ward Application No. 12 of 2003. The said application has been allowed by the impugned order dated 29th September, 2003. Feeling aggrieved, the petitioner has preferred the present petition.

By the aforesaid Application No. 12 of 2003, the respondent has claimed custody of minor Hemani on the ground that she is the only child of their deceased son Kirankumar and that they are financially better off than the petitioner and her present husband-Mukundchandra Bhatt. It is also stated that minor Hemani is ill-treated by her step father-Mukundchandra Bhatt; that the minor Hemani is not ready and willing to reside with her mother, the present petitioner and the said

Mukundchandra.

Be it noted that the aforesaid allegation made against the said Mukundchandra Bhatt is not supported by any evidence nor the said allegation has weighed with the learned Joint District Judge, Bharuch. The only consideration that has weighed with the learned Joint District Judge is the financial condition of the respondent. The learned Judge has stated that having regard to the financial condition of the respondent, the welfare of minor Hemani can be better taken care of by the respondent. The custody of minor Hemani has accordingly been ordered.

Learned advocate Mr. Pandya has submitted that the petitioner is a natural guardian of the minor Hemani. In absence of her father, the mother has a legitimate right to custody of the minor, and therefore, she cannot be deprived of her child.

Learned advocate Mr. Shah has submitted that what is paramount is the welfare of the child. Learned Joint District Judge has taken care of the welfare of the minor Hemani and has made orders accordingly. He has submitted that the respondent shall be ready and willing to hand over custody of the minor Hemani to the petitioner, if, minor Hemani is ready and willing to reside with the petitioner. He has relied upon the judgments of the Hon'ble Supreme Court in the matters of Dr. {Mrs.} Veena Kapoor v. Varinder Kumar Kapoor [AIR 1982 SC 792]; of Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashankar Joshi [1993 (1) GLR 583] and of Bijay K. Prasad v. Ranjana [(1999) 9 SCC 544].

There shall be no dispute that while considering the question of custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of one or the other party. All the aforesaid judgments are in respect of custody of a minor child where the parents of such child were estranged from each other i.e., the father and the mother of the child were living separate and the question arose whether the custody of the child be given to the father or the mother. The said judgments cannot be applied to the facts of the present case in stricto sensu.

As recorded hereinabove, the respondent before this Court is the grandfather of the minor Hemani. Ever since her birth, she had been residing with her parents and the grandparents. The grandparents are bound to have natural love and affection for the minor child and vice

versa. However, in my view that alone cannot decide the question of custody of the minor. It is indisputable that the petitioner is the only natural guardian of the minor Hemani. Ordinarily, it is the petitioner who is entitled to the custody of the minor and it is the petitioner alone who can best look after the welfare of the minor Hemani. There is nothing on the record; not even the slightest allegation that the petitioner has not been looking after the interest of minor Hemani or that she is not fit to look after the welfare of the said child. The sound financial condition of the grand parents cannot be the parameter by which the child's welfare can be ascertained. The remarriage of the petitioner and the existence of a child of her husband's previous marriage cannot be the ground for refusing custody of minor Hemani to the petitioner.

As to the ascertainment of the wishes of the minor Hemani, it should be noted that minor Hemani has been residing with her grandparents ever since her birth and for around last one year she has been so residing without her mother. Now; when the minor Hemani has been separated from her mother for nearly an year and having regard to her tender age, it would not be justiciable to try to ascertain her wish by calling her in the Court-room. I, therefore, do not accept the offer made by the learned advocate Mr. Shah of bringing the minor Hemani to the Court and to ascertain her wishes.

In the aforesaid circumstances, the petition is allowed. The impugned order dated 29th September, 2003 made by the learned Joint District Judge, Fast Track Court, Bharuch below Application Exh.5 in Guardian-Ward Application No. 12 of 2003 is quashed and set-aside. Rule is made absolute. Parties shall bear their own costs.

The respondent no. 1 is directed to handover custody of minor Hemani to her mother, the present petitioner. The petitioner shall be under an obligation to submit the welfare report of the minor Hemani to the Court below every three months. Learned advocate Mr. Pandya submits that marriage of the brother of the petitioner i.e. the maternal uncle of minor Hemani is to be solemnized on 29th April, 2004. He, therefore, requests that custody of minor Hemani be handed-over to the petitioner soon.

The respondent is, therefore, directed to take minor Hemani to her maternal uncle-Shri Bhupendra Kumar Vyas's house at village Karantha, Taluka Nandol,

District-Narmada on 26th April, 2004 and to hand-over the custody of minor Hemani to the present petitioner. Pending the aforesaid Guradian-Ward Application No. 12 of 2003, the custody of minor Hemani shall remain with the present petitioner.

Registry shall send the writ forthwith.

{Miss R.M Doshit, J.}

Prakash*